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FEDERAL ELECTION COMMISSION

**999 E Street, N.W.
Washington, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 7128
DATE COMPLAINT FILED: Aug. 19, 2016
DATE OF NOTIFICATION: Aug. 24, 2016
DATE OF LAST RESPONSE: Aug. 30, 2016
DATE ACTIVATED: Nov. 29, 2016

ELECTION CYCLE: 2016
EARLIEST SOL: July 1, 2021
LATEST SOL: Aug. 30, 2021

COMPLAINANT:

Matthew J. Henney

RESPONDENTS:

KelliPAC
Doug McKee, in his official capacity as Treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(a)
52 U.S.C. § 30104(b)
52 U.S.C. § 30104(g)
11 C.F.R. § 104.4

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint alleges that KelliPAC and Doug McKee in his official capacity as treasurer (the "Committee") failed to timely file 24- or 48-Hour Reports for a then-unknown number of independent expenditures supporting Kelli Ward, a candidate in Arizona's August 30, 2016, Republican primary election for the U.S. Senate. The Committee responded by stating that it had been unaware of the filing requirement and upon learning of the requirement on August 23, 2016, it immediately filed late 24- or 48-Hour Reports for \$710,787.55 in independent

1 expenditures it had made in July and August 2016. Because the Committee filed the reports
2 disclosing its independent expenditures before the August 30, 2016, primary election, we
3 recommend that the Commission exercise its prosecutorial discretion to dismiss the allegations.

4 II. FACTUAL AND LEGAL ANALYSIS

5 A. Factual Background

6
7 KelliPAC is an independent-expenditure-only political committee that is registered with
8 the Commission.¹ KelliPAC was formed specifically to support Ward's campaign against
9 Senator John McCain in Arizona's August 30, 2016, primary election.² Doug McKee is
10 KelliPAC's treasurer.

11 On August 15, 2016, the Committee reportedly announced its plan to spend between
12 \$600,000 and \$1.2 million on advertisements supporting Ward and opposing McCain in the
13 upcoming Republican Senate primary election.³ On or about August 12, 2016, the Committee
14 began airing a television advertisement titled "Betrayed Us" in the Phoenix and Tucson markets.⁴
15 The ad expressly advocated the election of Ward, and included a large graphic stating "Kelli
16 Ward for U.S. Senate."⁵ Complainant alleges that he did not find any 24- or 48- Hour Reports

¹ Statement of Organization, KelliPAC (Feb. 18, 2015),
<http://docquery.fec.gov/pdf/988/15031394988/15031394988.pdf>.

² <http://kellipac.us/mission-statement/>. Ward lost the primary election. The Committee currently has cash
on hand of \$7,000.47 and zero debts. 2016 Year End Report, KelliPAC (Feb. 1, 2017),
<http://docquery.fec.gov/pdf/267/201702019042403267/201702019042403267.pdf>.

³ See Compl., Cover letter; <http://azcapitoltimes.com/news/2016/08/15/pro-ward-super-pac-plans-seven-figure-ad-campaign/>.

⁴ Compl. at 1; http://politicaladarchive.org/ad/PolAd_JohnMcCain_KelliWard_9uz6d/. The Complaint
alleges that the ad cost at least \$29,540 to run between August 12 and 14. Compl. at 1. McKee reportedly stated on
August 15, 2016 that the ad costs \$600,000. <http://www.politico.com/tipsheets/morning-score/2016/08/the-gop-establishment-strikes-back-215871>.

⁵ <https://www.youtube.com/watch?v=ZQldkK8VLxs>. The ad is also referred to as the "Time for Change
Kelli" ad. <http://www.iagreetosee.com/portfolio/kelli-ward-super-pac-john-mccain-ad/>.

disclosing expenditures for the advertisement in the Commission's database, and he filed a Complaint on August 19, 2016, alleging that KelliPAC failed to disclose the expenditures.⁶

The Committee acknowledges that it failed to file timely 24- and 48-Hour independent expenditure reports.⁷ The Committee explains that it mistakenly believed that "PACs were excluded from [the pre-election reporting requirements] because of the 'Candidates Only' [heading] under the '48 hour Notices' section" of the Commission's "Getting Started Manual."⁸ After learning of the Complaint, the Committee conferred with Commission's Reports Analysis Division staff on August 23, 2016, and learned it should have filed 24- and 48-Hour Reports.⁹ On August 23, 2016, the Committee filed untimely 24- and 48-Hour Reports disclosing 27 independent expenditures totaling \$710,787.55 that it made between July 1 and August 23, 2016.¹⁰

⁶ Compl. at 2.

⁷ Committee Resp. at 1 (Aug. 30, 2016).

⁸ *Id.* The Committee claims that it included a copy of the "Manual" page in its Response, however, the referenced attachment was actually a copy of the Commission's public notice of the 24-Hour reporting period.

⁹ Committee Resp. at 1. The Complaint was mailed to the Committee on August 24, 2016. The Complaint, however, was publicized as early as August 22, 2016, and information shows that the Committee was aware of the Complaint before it filed its 24 and 48-Hour Reports. See <http://www.12news.com/news/politics/mccain-foe-gets-money-from-billionaire-tied-to-trump-breitbart/305173825>; <https://morningconsult.com/2016/08/23/super-pac-spending-john-mccain-kelli-ward/>. The Committee contacted RAD on August 23, 2016, to inquire whether it was in compliance with its primary election filings in light of the instant Complaint and spoke with a RAD Analyst, who explained the 24 and 48-Hour reporting requirements and suggested that the Committee also review the Commission's Campaign Guide and Getting Started with FECfile User Manual for PAC and Party Committees.

¹⁰ Committee Resp. at 1, Attachs. 6-7; <http://docquery.fec.gov/pdf/712/201608239023730712/201608239023730712.pdf#navpanes=0>; <http://docquery.fec.gov/pdf/699/201608239023730699/201608239023730699.pdf#navpanes=0>. The expenditures reported on the 24- and 48-hour reports included various independent expenditures from July 2016 that the Committee previously reported in its 2016 August Monthly Report.

1 The Committee disclosed total independent expenditures of \$761,327.53 on its 2016
2 Year-End Report.¹¹ Of the 30 independent expenditures that the Committee disclosed, 27 of
3 them, totaling \$710,787.55, were disclosed late.¹²

4 **B. Legal Analysis**

5 Committee treasurers are required to file reports of disbursements, including any
6 independent expenditures the committee makes.¹⁴ A committee that makes independent
7 expenditures must report them in its regularly scheduled disclosure reports in accordance with
8 11 C.F.R. § 104.3(b)(3)(vii). A committee is also required to file a 24-Hour independent
9 expenditure notice when it makes more than \$1,000 in independent expenditures within 20 days,
10 but more than 24 hours before, the date of an election, and must file additional notices within 24
11 hours after each time it makes or contracts to make independent expenditures aggregating at least
12 an additional \$1,000 with respect to that election.¹⁵

¹¹ 2016 Year End Report, KelliPAC (Feb. 1, 2017),
<http://docquery.fec.gov/pdf/267/201702019042403267/201702019042403267.pdf>.

¹² Two of the independent expenditures that were filed on August 23, 2016, were not untimely disclosed — the \$18,750 expenditure that was disseminated on August 23, 2016, was timely disclosed in the Committee's 24-Hour Report on August 24, 2016, and the \$689.98 expenditure that was disseminated on August 30, 2016, is outside the 24-Hour reporting period, which ended on August 28, 2016. On October 21, 2016, the Committee disclosed an additional independent expenditure of \$31,100 that it reported as having been disseminated on September 10, 2016 October Monthly Report, KelliPAC (Oct. 21, 2016); <http://docquery.fec.gov/pdf/024/201610219034504024/201610219034504024.pdf>. On January 29, 2017, RAD issued a RFAI to determine whether the communication was disseminated prior to the primary election. <http://docquery.fec.gov/pdf/361/201701290300076361/201701290300076361.pdf>. The RFAI gave the Committee until March 6, 2017 to respond.

¹⁴ 52 U.S.C §§ 30104(a), (b); 30104(b)(4)(H)(iii), *see also* 11 C.F.R. § 104.3(b)(1)(vii). An "independent expenditure" is an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 C.F.R. § 100.16(a).

¹⁵ 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 104.4(c). The time period for 24-Hour independent expenditure reports for the Arizona primary ran from August 11 to August 28, 2016. *See* http://www.fec.gov/info/charts_ie_dates_2016.shtml#anchorAZ.

1 Additionally, a political committee that makes or contracts to make independent
2 expenditures aggregating \$10,000 or more, in connection with a given election, at any time
3 during a calendar year up to and including the 20th day before the date of an election shall file a
4 report describing the expenditures within 48 hours.¹⁶ These reports, known as 48-Hour Reports,
5 must be filed by the end of the second day following the date on which a communication that
6 constitutes an independent expenditure is publicly distributed or otherwise publicly
7 disseminated.¹⁷ A committee is required to file additional reports within 48 hours after each time
8 it makes or contracts to make independent expenditure aggregating at least an additional \$10,000
9 with respect to that election.¹⁸

10 The available information shows that the Committee untimely filed 24- and 48-Hour
11 Reports for 27 independent expenditures totaling \$710,787.55, including disbursements for the
12 "Betrayed Us" advertisement that is the focus of the Complaint.¹⁹ The Committee acknowledges
13 that it untimely filed these 24- and 48-Hour Reports. The Committee, however, claims that it
14 was a first-time filer, did not know that it had to file the reports, and promptly filed the reports
15 when it was advised that they were required. Although the Committee is ultimately responsible
16 for filing accurate reports with the Commission and inexperience does not excuse the violation,
17 we do not believe that further enforcement action is warranted in this instance. The record
18 shows that the Committee was recently established and had not filed any prior 24- or 48-hour

¹⁶ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

¹⁷ 11 C.F.R. § 104.4(b)(2).

¹⁸ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

¹⁹ The "Betrayed Us" advertisement, which aired during the relevant pre-election period, clearly identifies senatorial candidates Ward and McCain, includes the express advocacy phrase "Kelli Ward for U.S. Senate," and cost more than \$1,000, is an independent expenditure that requires appropriate 24- or 48-Hour Reports.

reports, and promptly filed the reports when it was advised that they were required. The Committee disclosed the expenditures of all of the applicable 24- and 48-Hour Reports.²⁰ Therefore, we recommend that the Commission dismiss as a matter of prosecutorial discretion the allegation that the Committee violated 52 U.S.C. § 30104(g).²¹

IV. RECOMMENDATIONS


1. Dismiss as a matter of prosecutorial discretion the allegation that KelliPAC and Doug McKee in his official capacity as treasurer violated 52 U.S.C. § 30104(g).
2. Approve the attached Factual and Legal Analysis.
3. Approve the appropriate letters.
4. Close the file.

Lisa J. Stevenson
Acting General Counsel

Kathleen Guith
Associate General Counsel
for Enforcement

2.17.17

Date


Stephen Gura
Deputy Associate General Counsel
for Enforcement

²⁰ RAD did not refer the late-filed 24- and 48-Hour Reports to either ADRO or OGC because RAD's referral threshold

2015-2016 Reports Analysis Division
Review and Referral Procedures for Unauthorized Committees, Title 52 Authorized Committees, and Title 26 Authorized Committees (Standard 7) at 73.

²¹ *Heckler v. Chaney*, 470 U.S. 821 (1985);

Mark Shonkwiler
Assistant General Counsel

Kamau Philbert
Attorney

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RESPONDENTS: KelliPAC MUR: 7128
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official capacity as treasurer

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5 upcoming Republican Senate primary election.³ On or about August 12, 2016, the Committee
6 began airing a television advertisement titled "Betrayed Us" in the Phoenix and Tucson markets.⁴
7 The ad expressly advocated the election of Ward, and included a large graphic stating "Kelli
8 Ward for U.S. Senate."⁵ Complainant alleges that he did not find any 24- or 48- Hour Reports
9 disclosing expenditures for the advertisement in the Commission's database, and he filed a
10 Complaint on August 19, 2016, alleging that KelliPAC failed to disclose the expenditures.⁶

11 The Committee acknowledges that it failed to file timely 24- and 48-Hour independent
12 expenditure reports.⁷ The Committee explains that it mistakenly believed that "PACs were
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B. Legal Analysis

Committee treasurers are required to file reports of disbursements, including any independent expenditures the committee makes.¹³ A committee that makes independent expenditures must report them in its regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii). A committee is also required to file a 24-Hour independent expenditure notice when it makes more than \$1,000 in independent expenditures within 20 days, but more than 24 hours before, the date of an election, and must file additional notices within 24 hours after each time it makes or contracts to make independent expenditures aggregating at least an additional \$1,000 with respect to that election.¹⁴

Additionally, a political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more, in connection with a given election, at any time during a calendar year up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours.¹⁵ These reports, known as 48-Hour Reports, must be filed by the end of the second day following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated.¹⁶ A committee is required to file additional reports within 48 hours after each

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¹⁵ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

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4 Reports for 27 independent expenditures totaling \$710,787.55, including disbursements for the
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7 was a first-time filer, did not know that it had to file the reports, and promptly filed the reports
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9 for filing accurate reports with the Commission and inexperience does not excuse the violation,
10 we do not believe that further enforcement action is warranted in this instance. The record
11 shows that the Committee was recently established and had not filed any prior 24- or 48-hour
12 reports, and promptly filed the reports when it was advised that they were required. The
13 Committee disclosed the expenditures before the primary election. Therefore, the Commission
14 dismisses as a matter of prosecutorial discretion the allegation that the Committee violated 52
15 U.S.C. § 30104(g).¹⁹

¹⁷ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

¹⁸ The "Betrayed Us" advertisement, which aired during the relevant pre-election period, clearly identifies senatorial candidates Ward and McCain, includes the express advocacy phrase "Kelli Ward for U.S. Senate," and cost more than \$1,000, is an independent expenditure that requires appropriate 24 or 48-Hour Reports.

¹⁹ *Heckler v. Chaney*, 470 U.S. 821 (1985);